



SENATE BILL 853: Business Court Modernization

2013-2014 General Assembly

Committee:	House Finance	Date:	July 2, 2014
Introduced by:	Sens. Rucho, Barringer	Prepared by:	Trina Griffin
Analysis of:	Fifth Edition		Committee Counsel

SUMMARY: *Senate Bill 853 would change the procedures for designating mandatory complex business cases to be heard by the North Carolina Business Court. As it relates to the Finance Committee, the bill would require that all tax cases be designated as mandatory complex business cases, and it would increase the filing fee from \$1,000 to \$1,100 for all Business Court cases. The bill would also authorize the use of a holding company to effect internal corporate reorganization, validate forum selection provisions contained in corporate articles of incorporation and bylaws, and create a working group to study judicial efficiency and Business Court modernization.*

CURRENT LAW:

BUSINESS COURT CASES

The North Carolina Business Court is a specialized forum of the North Carolina State Courts' trial division. It is not a court of jurisdiction, but rather an administrative division of the General Court of Justice. Three special superior court judges designated by the Chief Justice of the Supreme Court serve as Business Court Judges presiding over complex business cases.

G.S. 7A-45.4 provides an expedited method for certain types of actions to be assigned to Business Court. An action involving a material issue related to any of the following subjects is considered a "mandatory complex business case."

- (1) Claims under the law governing corporations,¹ partnerships, limited liability companies, and limited liability partnerships
- (2) Claims under securities law
- (3) Antitrust law claims not based solely on unfair competition under G.S. 75-1.1
- (4) State trademark or unfair competition claims not based solely on unfair competition under G.S. 75-1.1
- (5) Intellectual property law, including software licensing disputes
- (6) The Internet, electronic commerce, and biotechnology
- (7) Any tax law dispute that was the subject of a contested tax case for which the taxpayer seeks judicial review under G.S. 105-241.16 or challenges in a civil action under G.S. 105-241.17

These cases are "mandatory" in the sense that if a party seeks designation as a mandatory complex business case by filing a notice with the court and the case fits within one of these categories, then the Business Court is required to retain jurisdiction. A party may oppose the designation of the action, or

¹ Other than certain charitable and religious organizations qualified under G.S. 55A-1-40(4) on the grounds of religious purpose.



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the court, on its own motion, may determine the action should not be designated. However, the option of seeking to have the case heard in Business Court currently lies with the parties to the case.

In 2007, tax cases were added to G.S. 7A-45.4 as part of the comprehensive overhaul of the tax appeals process (S.L. 2007-491). The intent of the provision was to treat tax cases like the other cases on the list. That is, a party to the case would have the option to seek designation. The intent was not to require that all tax cases to be heard in Business Court, but rather to allow taxpayers to retain the choice of forum and in recognition of the fact that not all tax cases are suitable for Business Court.² However, in practice, the Business Court has treated tax cases differently than the other six categories by deeming their designation as required. All tax actions since the enactment of the 2007 legislation, of which there have been 12 (4 of which were consolidated into one case), have been heard in the Business Court.³

In addition to the procedure for parties to designate a case as a mandatory complex business case under G.S. 7A-45.4, cases can also be designated by the Chief Justice as a complex business case on motion of a party or upon recommendation of a senior resident or presiding superior court judge or chief district court judge under Rule 2.1 of the General Rules of Practice. A case designated under Rule 2.1 as a complex business case is assigned to a Business Court Judge.⁴

The filing fee for designated complex business cases is \$1,000, in addition to the other court costs required to commence a civil action under G.S. 7A-305.

Under Rule 2.1(b) of the General Rules of Practice for the Superior and District Courts, Business Court Judges are currently required to issue a written opinion upon the final disposition of each case. Although not required to do so, Business Court Judges also generally issue written opinions on dispositive motions and on some non-dispositive motions involving novel issues. Appeals from the Business Court currently go to the Court of Appeals.

The Administrative Office of the Courts (AOC) is currently required to include in its annual report to the General Assembly information on the activities of the Business Court, including the number of new, closed and pending cases, the average age of pending cases, and the annual expenditures for the prior fiscal year.

CORPORATE REORGANIZATION

Under current law, approval by the boards of directors and shareholders of each constituent corporation is required in order for a corporation to effect a corporate reorganization through the creation of a holding company of which the surviving entity will become a subsidiary.

In response to shareholder litigation in multiple forums, some corporations have begun specifying an exclusive forum for shareholder lawsuits. Under current State law such a provision can be adopted by the board of directors without shareholder approval for inclusion in the bylaws of a corporation (G.S. 55-10-20) or can be included in the articles of incorporation of a corporation, either during the initial formation of the corporation (G.S. 55-2-02) or by amending existing articles of incorporation with the approval of shareholders (G.S. 55-10-03). However, in other jurisdictions, courts have differed over

² Bill Analysis for S.L. 2007-491 and *North Carolina's New Tax Assessment, Refund, and Appeals Process*, State Tax Notes (October 29, 2007).

³ According to information provided to committee staff by the administrative assistant for the Senior Business Court Judge and an Assistant Attorney General who defends these cases, all cases involving these tax appeals have been heard in the Business Court since the effective date of S.L. 2007-491.

⁴ Under Rule 2.1, the Chief Justice can also designate a case as "exceptional" rather than as "complex business," in which event the case can be assigned to a regular superior court judge selected to hear that case.

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whether such exclusive forum provisions that were adopted by the board of directors without shareholder approval are valid and enforceable.⁵

BILL ANALYSIS: Sections 1-5 and Section 8 relate to the Business Court.

Section 1 would amend G.S. 7A-27 to provide a direct appeal to the Supreme Court from final judgments and interlocutory orders of a Business Court Judge, bypassing the Court of Appeals. This section would become effective October 1, 2014, and apply to actions designated as mandatory complex business cases on or after that date.

Section 2 would require Business Court Judges to issue a written opinion upon final disposition of a complex business case upon disposition of motions to dismiss, for summary judgment, for a new trial, or for relief from a judgment.

Section 3 would do two things. First, it modifies the list of cases that *may* be designated by any party as mandatory complex business cases by adding certain contract disputes and disputes involving trade secrets and by eliminating intellectual property, Internet, e-commerce, and biotechnology cases. Second, it specifically creates a second category of cases that *must* be designated as mandatory complex business cases. Those cases are:

- Tax cases on appeal from a decision of OAH after a contested case hearing and actions challenging the constitutionality of a tax statute.
- An action that may be designated as a mandatory complex business case (those actions listed in subsection (a) except for contract cases under (9)) and in which the amount in controversy is at least \$5 million.
- An action involving the regulation of pole attachments.⁶

If a taxpayer in a tax case or the plaintiff in a pole attachment case does not designate the case as a mandatory complex business case, the action is stayed until the case is properly designated.

If an action required to be designated under new subdivision (b)(2) (those in selected categories that involve at least \$5 million in controversy) is not so designated, the Superior Court is permitted to stay the action but only before case has been called for trial.

For cases designated after a stay has been entered by the Superior Court, Section 3 would require the filing fee to be split *pro rata* among all parties to the case upon its designation as a mandatory complex business case, unless otherwise ordered by the Business Court on motion requesting some other allocation of the costs.

Section 3 requires that any opposition to a notice of designation or to proceeding in Business Court must assert all grounds on which the opposition is based; any grounds not asserted are conclusively waived. Section 3 also clarifies that it is not intended to bring personal injury tort claims within the jurisdiction of the Business Court.

This section would become effective October 1, 2014, and apply to actions commenced or petitions filed on or after that date.

⁵ See, e.g., *Galaviz v. Berg*, 763 F.Supp.2d 1170 (N.D. Cal. 2011) refusing to enforce such a provision and *Boilermakers Local 154 Ret. v. Chevron Corp.*, 73 A.3d 934 (Del. Ch. 2013) enforcing such a provision.

⁶ This provision conforms G.S. 7A-45.4 to G.S. 62-350, which already requires these actions to be heard in Business Court.

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Section 4 increases the filing fee for complex business court cases from \$1,000 to \$1,100, and makes this a court cost that is assessable or recoverable in civil actions. This section would become effective October 1, 2014, and apply to actions commenced or petitions filed on or after that date.

Section 5 requires the AOC to submit a semiannual report to the General Assembly containing the following information, together with any explanation provided by the Business Court:

- The number of Business Court cases pending for more than three years.
- The number of motions pending for more than six months.
- Cases in which bench trials have been concluded for more than six months without entry of judgment⁷.

Section 8 would create the Working Group on Judicial Efficiency and Business Court Modernization comprising the following 18 members:

- 3 Representatives appointed by the Speaker
- 3 Senators appointed by the President Pro Tempore
- 1 AOC representative appointed by the Chief Justice
- 1 current or former employee of the School of Government appointed by the Governor
- 3 superior court judges, one each of which appointed by the Speaker, the President Pro Tempore, and the Governor
- 1 district attorney appointed by the Speaker
- 1 licensed criminal law attorney who is not a district attorney appointed by the President Pro Tempore
- 1 expert in judicial information technology appointed by the President Pro Tempore upon recommendation of the AOC
- 1 experienced civil litigator appointed by the Speaker
- 1 experienced civil litigator appointed by the President Pro Tempore
- 1 public interest attorney appointed by the Speaker
- 1 experienced appellate litigator appointed by the Chief Justice

The working group would be authorized to study:

- Court efficiency, resource management, and other management needs of the General Court of Justice to guide the General Assembly in determining the court system's needs.
- Implementation of this act's efforts to modernize complex business cases.
- Any other issue relevant to the study.

The working group would be authorized to submit an interim report to the General Assembly at any time, and would be required to submit its final report, including any proposed legislation prior to the convening of the 2015 General Assembly.

⁷ This reporting requirement is substantially identical to the "six-month report" required for federal district courts under the Civil Justice Reform Act of 1990. [28 U.S.C. §476](#).

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Sections 6 and 7 related to corporate reorganizations and exclusive forum or venue provisions.

Section 6 would restore the provisions in the bill's fourth edition that would simplify the process by which corporations and limited liability companies that are incorporated or organized in North Carolina can accomplish an internal reorganization by use of a holding company. This section would become effective October 1, 2014.

Section 7 would make valid and enforceable a provision in the articles of incorporation or bylaws specifying a forum or venue in North Carolina as the exclusive forum or venue for litigation relating to the internal affairs of the corporation. This section would become effective when it becomes law and applies to all articles of incorporation and bylaws and all amendments thereto adopted on or after that date.

EFFECTIVE DATE: Except as otherwise provided, this bill would become effective when it becomes law.

Bill Patterson, Counsel to Senate Judiciary I, Brad Krehely, Counsel to House Judiciary Subcommittee B, Counsel to Senate Finance, and Peter Ledford, Counsel to Senate Commerce, substantially contributed to this summary.